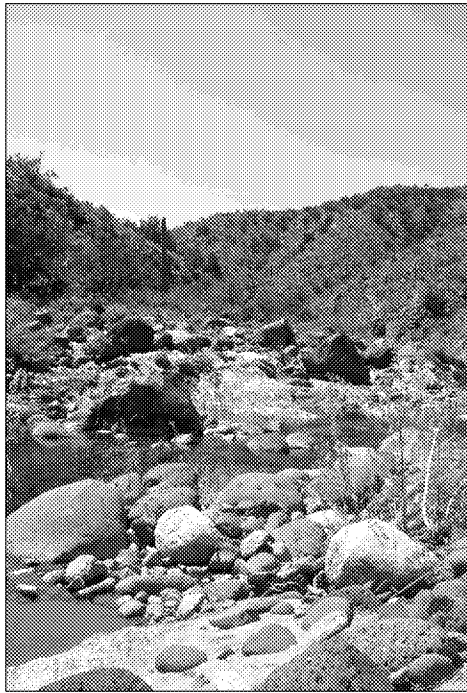


Potential State of Arizona Assumption CWA §404 Dredge and Fill Permit Program

10/31/2018

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Today's Discussion...

- Description of 404 program assumption description and requirements
- Tribal, EPA, and state roles in assumption
- Tribal concerns and engagement



Key Points...

- Corps maintains administration of 404 program for tribal lands (no change)
- ADEQ plans to submit application to EPA in October 2020
- Assumed program must be no less stringent than the CWA and regulations
- EPA oversight of assumed program
- EPA decision will involve tribal engagement/consultation

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This is the first comprehensive revisions since 1988

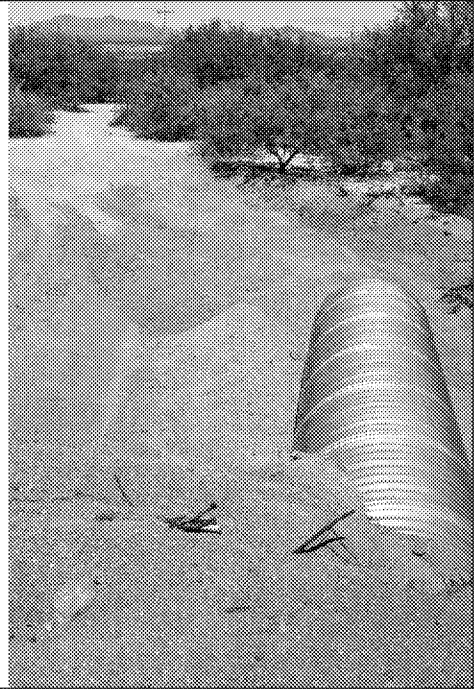
The regulations need to be updated and improved to increase interest in assuming CWA 404 permitting authority

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What Is Section 404 Program Assumption?

- Under Section 404, a permit is required before dredged or fill material can be discharged into waters of the US
- Section 404(g) provides for tribes and states to assume the program for certain waters
 - Only Michigan (1984) and New Jersey (1994) have assumed this authority
 - EPA oversees assumed programs
- CWA Section 404(g) and 40 CFR Part 233 describe:
 - Tribal and state program requirements
 - EPA responsibilities: approval and oversight of assumed program
 - Requirements for review, modification, and withdrawal of assumed program (as necessary)



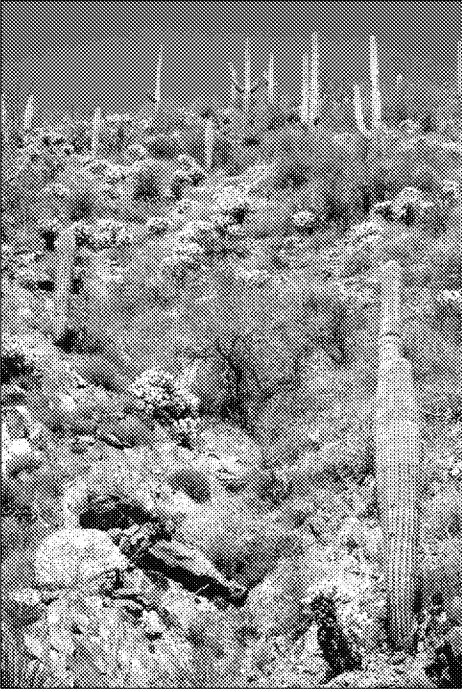
How many people are familiar with the 404 program?

As we know, under the 404 program, a permit must be obtained before dredged or fill material can be discharged into the waters of the U.S.

For almost all states and tribes, 404 permits are currently obtained through the USACE.

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Why Assume the 404 Program?

- **Why assume? Tribes and states have said:**
 - Streamline permitting – reduce timeframes
 - Knowledge of and closer to the water resources
 - Coordinate with other water & land use programs
 - Eliminate unnecessary duplication between programs
 - Similar to other CWA programs implemented by tribes and states
- **What barriers have tribes and states identified?**
 - Cost and lack of dedicated funding
 - Program complexity
 - Lack of clarity on assumption process and requirements
 - Satisfied with Corps program administration

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Could also be directed to by state legislature, governor or statute

What barriers do you envision?

Working out acceptable way to handle threatened and endangered species issues with USFWS

The Corps is doing fine

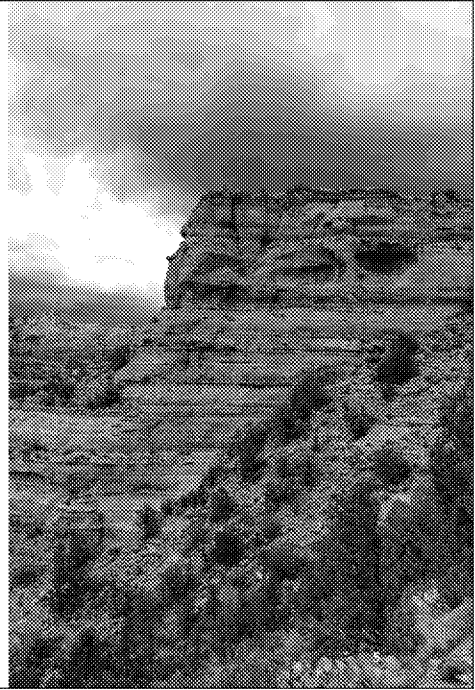
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What Are the Requirements for Assumption?

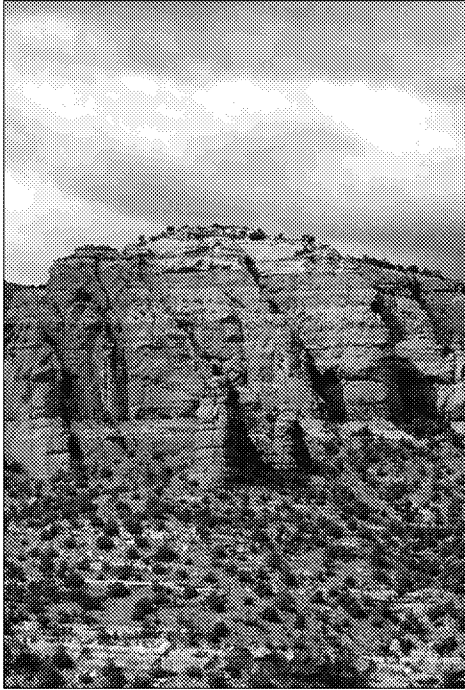
- Assumed program must be consistent with and no less stringent than the CWA and regulations
- Assumed program must:
 - Have equivalent scope of jurisdiction*
 - Regulate at least the same activities
 - Provide for sufficient public notice
 - Ensure compliance with the 404(b)(1) guidelines
 - Have adequate enforcement authority
 - Include MOAs with EPA and USACE

** State or tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope*



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What is EPA's Role in Assumption?

- **Prior to assumption**
 - Provide financial and technical assistance with tribes and states to enhance capacity and develop programs
- **Evaluate and approve/disapprove assumption request**
 - Determine application package is complete
 - If so, 180 days to decision
 - Tribal consultation prior to decision
 - Decision by Regional Administrator in consultation with EPA HQ
- **EPA oversight of assumed program**
 - Review and comment on permits (*non-waived*)
 - Annual program review to ensure compliance with CWA requirements
 - Review of program modifications
 - Withdraw program approval, if needed

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Waiver of review:

MOA with EPA identifies categories of projects for which EPA review is waived

EPA cannot waive review of:

Draft general permits

Discharges that may impact endangered species

Discharges that may adversely impact waters of another state

Discharges with known or suspected toxic or hazardous pollutants

Discharges proximal to public water supply intakes

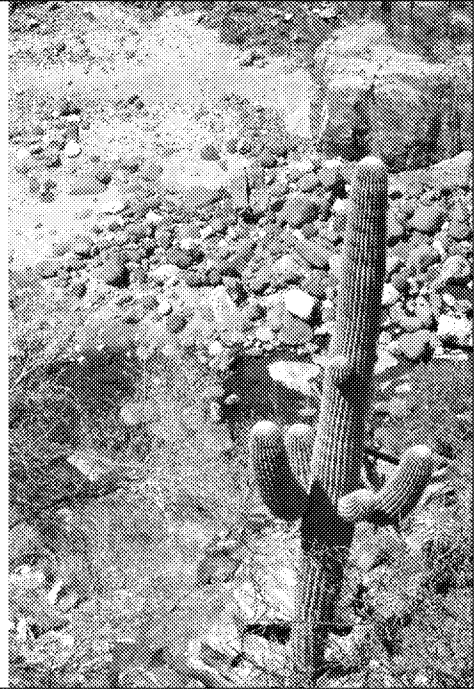
Discharges within critical State/Federal areas

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What is the State's Role When a Program is Assumed?

- Develop and administer state dredge and fill program that is no less stringent than the CWA and regulations
- Transmit to EPA public notices of permit applications where EPA review is not waived
 - EPA seeks comments from Corps & FWS and provides comments to state
- A state shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- A state does not administer program on tribal lands – the Corps maintains program on tribal lands



If a state assumes the program – the Corps retains authority to issue permits for tribal lands.

In R9, Arizona is the only state that has indicated an interest to date in taking it on – the State legislature passed legislation in April 2018 providing ADEQ with the authority to pursue assumption. Subsequently, ADEQ, has initiated a stakeholder process along with tribal outreach and consultation to develop a program and submit an application to EPA by June 2020. As ADEQ has indicated, they very much want to assume the program and they understand that there schedule is very ambitious, especially since they have no existing wetlands program.

Again, for the tribes in a state with an assumed program – the corps retains permit authority on tribal lands
States need to consult with tribes and receive comments

If state can't address comments the state needs to send the permit along with comments and why they couldn't be address

Explain what not waived permit review means

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What Could Arizona's Assumption of the 404 Program Mean for Tribes?

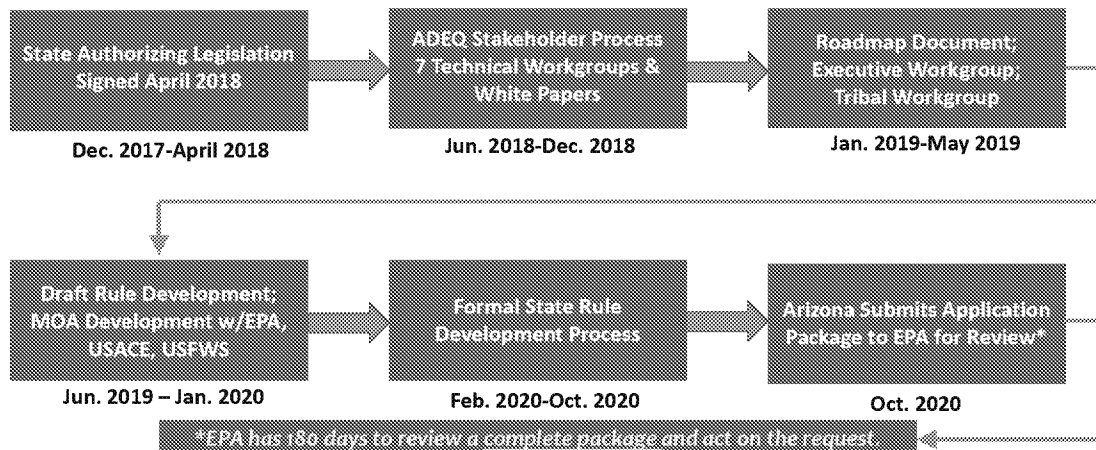
- Corps maintains administration of Section 404 program on tribal lands
- EPA continues to complete 401 water quality certifications for tribes not approved for issuing water quality certifications
- Tribal interests heard to date...
 - Protection of cultural resources - commitment to minimize impacts to cultural resources and waters.
 - Potential impacts to tribal waters based on upstream projects
 - Potential change in appeal process - state court vs. federal court

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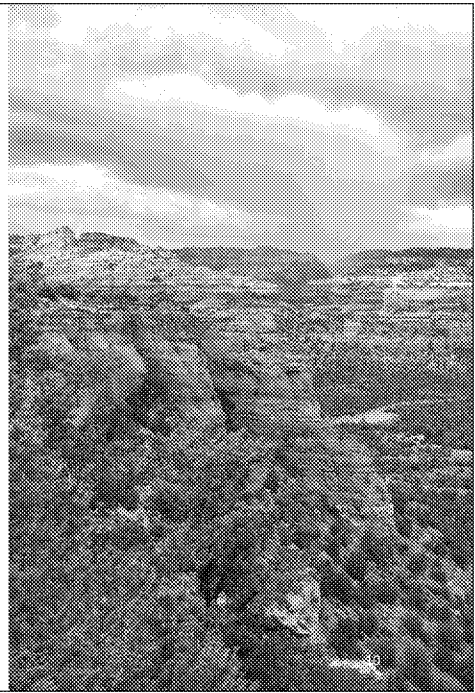
Arizona §404 Program Development & Assumption Process and Timeline



7 Technical Work Groups - White Papers Due 12/20/18
 Permit Process
 Compensatory Mitigation
 Cultural and Historic Resources
 Endangered Species Act
 Fees
 Jurisdictional Designation Process
 Significant Degradation, Alternative Analysis, Minimization
 Tribal Listening Session, Consultation, Tribal Work Group

Tribal/EPA Engagement

- **RTOC**
 - 404 assumption session at each RTOC
- **ADEQ Tribal Workgroup**
 - EPA participation at request of tribes
- **Information Sharing**
 - Fact sheets
- **Pre-Consultation Scoping Meetings**
- **After Submittal of Complete Application Package**
 - EPA letter to tribes offering formal consultation
 - Public hearing in Arizona
- **Additional ideas/requests?**



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For More Information

EPA Region 9

Sam Ziegler (415) 972-3399

ziegler.sam@epa.gov

Elizabeth Goldmann (415) 972-3398

goldmann.elizabeth@epa.gov

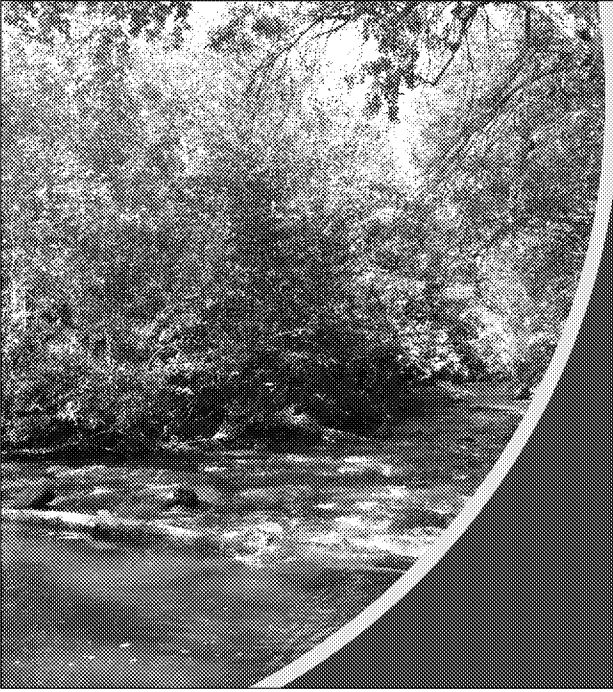
EPA 404 assumption website: <https://www.epa.gov/cwa404g>

ADEQ 404 assumption website: <https://azdeq.gov/cwa-404>

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Thank You!

Questions and Discussion

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EPA is Revising the CWA Section 404(g) Regulations

- First comprehensive revision to the existing CWA section 404(g) regulations since 1988
- Tribal consultation and coordination - October 22 - December 21, 2018
 - Consultation letters signed October 18, 2018
 - To view consultation letter and materials, visit: <https://tcots.epa.gov>
- EPA is seeking early input in the development of regulatory policies that may have tribal implications

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EPA is seeking input on how the CWA section 404(g) regulations can be updated and improved to increase interest in assuming CWA 404 permitting authority

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